

ASSUNTA HOSPITAL v. DR. A. DUTT

[O.C.J. (Mohamed Azmi J.) January 23, 1979]

[Kuala Lumpur — Originating Summons No. 402 of 1976]

Industrial Law — Dismissal of medical officer — Reference by Minister of Labour — Jurisdiction of Court — Whether reference can be heard by Chairman alone — Industrial Relations Act, 1967, ss. 20 & 23.

In this case the Minister for Labour referred a representation by the respondent that he had been dismissed without just cause or reason to the Industrial Court. The applicants applied for an order of prohibition to prohibit the Chairman of the Industrial Court from proceeding with the hearing of the case on the grounds *inter alia* that the Industrial Court had no jurisdiction to hear the case and that the Chairman sitting alone could not deal with the matter.

Held: (1) once a case has been referred to the Industrial Court by the Minister, the Industrial Court is fully endowed with jurisdiction;

(2) as the reference was made under section 20(3) of the Industrial Relations Act, 1967, it was lawful for the Chairman by virtue of the proviso to section 23(4) of the Act, to sit alone in dealing with the case.

Cases referred to:-

- (1) *Kesatuan Pekerja-Pekerja Kenderaan Sri Jaya v. Industrial Court & Ors.* [1970] 1 M.L.J. 78, p. 81.
- (2) *Attorney-General, Malaysia v. Chemical Workers Union of Malaya & Anor.* [1971] 1 M.L.J. 38.
- (3) *D.C. Works Ltd. v. State of Saurashtra A.I.R.* 1957 S.C. 264.
- (4) *Employees Provident Fund Board v. Bata Shoe Co. (M) Ltd.* [1968] 1 M.L.J. 236.

The following authorities were cited in argument: *Raymond Banham & Anor. v. Consolidated Hotels Ltd.* [1967] 1 M.L.J. 5; *Simpson v. Ebbw Vale Steel, Iron and Coal Co.* [1905] 1 K.B. 453; *Bagnall v. Levinstein Ltd.* [1907] 1 K.B. 531; *Simmons v. Health Laundry Co.* [1910] 1 K.B. 548; *Smith v. Martin & Corporation of Kingston-Upon-Hill.* [1911] 2 K.B. 775; *Stevenson Jordon & Harrison, Ltd. v. MacDonald & Evans* [1952] T.L.R. 101; *Emerald Construction Co. Ltd. v. Lowthian & Ors.* [1966] 1 W.L.R. 691; *Hillyer v. The Governors of St. Bartholomew's Hospital* [1909] 2 K.B. 820; *Construction Industries Training Board v. Labour Fork Ltd.* [1970] 3 All E.R. 220; *The Government of the State of Kelantan v. The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj.* [1963] M.L.J. 355; *Reg. v. Judge of Greenwich County Court* (1889) 60 L.T.R. 248 C.A.; *Cargo Handling Corporation Ltd. v. Cargo Handling Corporation Staff Union* [1966] 2 M.L.J. 278.

ORIGINATING SUMMONS.

D. Puthuchear for the applicant.

R. Chelliah (*G. Sri Ram* with him) for the respondent.

Cur. Adv. Vult.

Mohamed Azmi J.: This is an application by notice of motion by Assunta Hospital for an Order of Prohibition to prohibit the Chairman of the Industrial Court, Mr. K. Somasundram, from proceeding with the hearing of Industrial Court Case No. 83 of 1976 on the grounds that:—

- (1) the Industrial Court has no jurisdiction to order the Comptroller of Immigration to issue a Visit Pass for temporary employment in place of a citizen;
- (2) the Industrial Court does not have jurisdiction to hear the case, because it cannot order the reinstatement of a non-citizen;
- (3) the respondent, Dr. A. Dutt, is not a "workman" under the Industrial Relations Act, 1967, since the Doctor's contract with the applicant Hospital was a contract for service and not a contract of service; and

- A (4) the Chairman of the Industrial Court by sitting alone without the consent of the parties, contravenes section 20(4) of the Industrial Relations Act and is proceeding without jurisdiction.

Counsel for the Hospital, however, concedes that the actual issue in this case is whether the Industrial Court has jurisdiction to hear Dr. Dutt's case.

- B The brief facts of the case as contained in the affidavit of Dr. Thomas Varughese, the Medical Supervisor of the applicant Hospital, are that Dr. Dutt joined the Assunta Hospital — a corporation registered under the Companies Act — on September 1, 1963 as a Radiologist. When Dr. Dutt's services were terminated by the Hospital on February 29, 1976, he was holding the post of Director of Radiology and the Head of the Hospital's Radiological Department, by virtue of his contract with the Hospital in 1972. Under the said contract, his period of engagement was "permanent", but the contract could be terminated with three months' notice on either side. His salary was fixed at \$3,000 per mensem plus 50% of the fees of first-class patients; patients referred by medical practitioners and other patients seeking radiological examination. Other benefits included vacation leave, sick leave, Provident Fund contribution and free double return air passage to India once in three years. At all relevant times, Dr. Dutt is not a citizen of Malaysia, and he has been working in this country since 1963 on a Visit Pass (Temporary Employment) granted under rule 11 of the Immigration Regulation, 1963 on a yearly basis. As far as the Malaysian Government is concerned, the post held by Dr. Dutt can be filled by expatriate until the end of 1980, after which period, the position will be reviewed. On May 4, 1976, the Honourable Minister for Labour referred to the Industrial Court under section 17A(3) [now section 20(3) — Act 177] a representation made by Dr. Dutt that he had been dismissed without just cause or reason. When the case came up for hearing in the Industrial Court on July 6, 1976, the Chairman, Mr. K. Somasundram, sat alone without a panel. As a result of the present application, the case before the Chairman of the Industrial Court was adjourned.

For purpose of convenience, I will deal with this application under the Revised Act (Act 177) of the Industrial Relations Act, 1967. Section 20 of the Revised Act has five sub-sections. The first three sub-sections provide:

- "(1) Where a workman who is not a member of a trade union of workmen considers that he has been dismissed without just cause or excuse by his employer he may, within one month of the dismissal, make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General nearest to the place of employment from which the workman was dismissed.
- (2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at within a period of not more than thirty days from the date of receipt of the representations. Where the Director General is satisfied that there is no likelihood of the representations being settled within the said period of thirty days or where the representations remain unsettled at the end of the said period of thirty days the Director General shall notify the Minister accordingly.
- (3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the court for an award."

My first observation is that the Minister of Labour is not a party in this case; nor is there any relief sought against his decision. On the face of the notice of motion, it must, therefore, be assumed that the exercise of the Minister's power under section 20(3) in referring Dr. Dutt's representation to the Industrial Court is not challenged. In the present application for prohibitory order, the question, therefore, arises whether the Industrial Court (in the instant case, the Chairman of the Court) can refuse to make an award in respect of a representation referred to it by the Minister for Labour. In my judgment, there is no provision in the Industrial Relations Act where the Industrial Court can disregard a decision made by the Minister under section 20(3) of the Act. That section gives unfettered discretion to the Minister; and the exercise of that discretion has not been specifically challenged in the notice of motion. The Minister is not obliged to state the grounds on which the discretion has been exercised. It might well be that he is unable to decide whether Dr. Dutt is or is not a workman under section 20(1). As stated by Suffian F.J. (as he then was) in *Kesatuan Pekerja-Pekerja Kenderaan Sri Jaya v. The Industrial Court & Ors.*⁽¹⁾:

"Before us the regularity of the Minister's act is not impugned and under section 114 of the Evidence Ordinance this court may presume and does presume that the Minister's official act has been regularly performed. When the matter has been referred to the Industrial Court by the Minister in the proper exercise of his power, what is the Industrial Court to do? Can it decline to act? I do not think so. The scheme of the Act read as a whole is that once a dispute of this nature has been referred by the Minister to the Industrial Court, the court is at once invested with jurisdiction and is obliged to decide one way or another...."

Similarly, in the present case, Dr. Dutt being dissatisfied with his dismissal, has made representation in writing under section 20(1) of the Act. Acting under section 20(3), the Minister has referred the representation to the Industrial Court for an award. What can the Industrial Court do other than entertain the representation and decide one way or another? The only difference between the Sri Jaya case and the present case is that the reference made by the Minister is not under the same section of the Act. The issue is the same, viz. can the Industrial Court refuse to make a decision once a representation is referred to it by the Minister? Again, in *Attorney-General, Malaysia v. Chemical Workers' Union of Malaya & Anor.*,⁽²⁾ it was held by Abdul Aziz J. that once a case is referred to it, the Industrial Court is seized with power to hear the dispute and make its award.

I am, therefore, of the view that whatever may be the rights of the parties, once the case is referred to the Industrial Court, it is fully endowed with jurisdiction.

Once endowed with jurisdiction, it is for the Industrial Court to decide, *inter alia*, whether Dr. Dutt is a "workman" within the meaning of section 20(1). If he is a workman, the court must decide whether he has been dismissed without just cause or reason. If the court decides he has been dismissed without just cause or reason, the court will proceed to make an "award", which under section 2 is not confined merely to reinstatement but is wide enough to cover the power to make other orders in respect of the

A matter referred to it.

The question of whether Dr. Dutt is a "workman" is a question of fact for the Industrial Court to decide. The relationship between employer/employee or master/servant is pure question of fact. (See *D.C. Works Ltd. v. State of Saurashtra*⁽³⁾). Whether or not there is a contract of service or for service and between whom is a pure question of fact. (See *Employees Provident Fund Board v. Bata Shoe Co. (M) Ltd.*⁽⁴⁾).

Having regard to the authorities and the provisions of the Industrial Relations Act, I hold that the Industrial Court has jurisdiction to hear the case of Dr. Dutt referred to it by the Minister under section 20(3). No award has yet been made by the Industrial Court except that Mr. Somasundram has apparently decided Dr. Dutt is a "workman". In deciding whether or not to order reinstatement, the Industrial Court must, of course, consider whether Dr. Dutt has been dismissed without just cause or reason, and since Dr. Dutt is not a citizen, it must also consider evidence on immigration problems pertaining to Malayanisation policy of the Government. Whether Dr. Dutt would be allowed by Immigration Authorities to extend his stay in this country under Visit Pass (Temporary Employment) is an important matter for the court to decide. In lieu of reinstatement, the Industrial Court can award compensation.

Although the next point is of secondary issue, it is the case of Assunta Hospital that the Chairman of the Industrial Court is proceeding without jurisdiction by sitting alone without a panel as required by section 23(3) of the Act (Act 177). On Division of the Industrial Court, that subsection provides:

"Any Division shall be constituted of a Chairman and three members selected by the Minister, one from each of the panels specified in section 21(1)."

A proviso is, however, enacted in section 23(4) which reads:

"Notwithstanding the foregoing sub-sections, for the purpose of dealing with any reference to the court under section 20(3), a Division may be constituted by the Chairman sitting alone."

Since the present reference is made by the Minister under section 20(3) of the Act, I find it is lawful for the Chairman of the Industrial Court to sit alone in dealing with Dr. Dutt's case.

Having regard to the fact that only question of jurisdiction of the Industrial Court has been raised in this case, I feel whether the Minister has acted wrongly by referring a case of the present nature to the Industrial Court should be decided elsewhere. So is the question of whether there is a limit to the operation of section 20(1) of the Industrial Relations Act, and, if so, the extent of such limitation.

For the above reasons, I am of the opinion that this is not a proper case where an order of prohibition should be granted. Accordingly, I dismiss the application with costs.

Application dismissed.

Solicitors: *Skrine & Co.; Sri Ram, Chan & Chia.*